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Limiting Freedom During the Covid-19 Emergency in Italy: Short Notes on the New “Populist Rule of Law”

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Abstract: The implications of the severe lockdown regime introduced in Italy in the context of the Covid-19 emergency can be correctly understood only through a broader look at how the text of the provisions adopted by the government is transformed by media reporting and law enforcement practice. From such a perspective, it appears clearly that we are witnessing nothing more than the most recent segment of a populist approach to the use of legal tools, the history of which starts well before the pandemic.

Keywords: Covid-19, rule of law, media, law enforcement

1 Introduction

The actual impact of the severe restrictions to the rights of individuals introduced by the Italian government to deal with the Covid-19 emergency cannot be understood through the simple reading of the different legal provisions enacted in the last couple of months, and neither one can solely rely on the scholarly articles that have been published on the subject over a short time, mostly in order to assess the compatibility of such provisions with the guarantees enshrined in the constitution¹.

The final choice of the government guided by Giuseppe Conte – a professor of private law lacking any previous political profile – when Italy found itself in the

1 See e.g., Gaetano Azzariti, “I limiti costituzionali della situazione d'emergenza provocata dal Covid-19”, *Questione giustizia online*, March 27, 2020; Ilenia Massa Pinto, “La tremendissima lezione del Covid-19 (anche) ai giuristi”, *Questione giustizia online*, March 18, 2020; Maria Giuliana Civinini e Giuliano Scarselli, “Emergenza sanitaria. Dubbi di costituzionalità di un giudice e di un avvocato”, *Questione giustizia online*, April 14, 2020.

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uncomfortable position of first European country to be touched by the Covid-19 pandemic was to introduce a “lockdown” that, besides stopping all economic activities not deemed essential, implied a prohibition for individuals to leave home without a specific justification based on one of the grounds identified in the relevant decrees enacted by the executive.

This exceptional legal regime, unprecedented in Italy after WW II, was adopted and implemented with the support of a public awareness campaign based on the slogan “I stay at home” (*Io resto a casa*). A campaign that presents the fact of “staying at home” as the ultimate contribution that an individual can give to the fight against the pandemic. Citizens are under a constant mediatic flow pressuring for compliance with the lockdown rules. The readings of the “positive law” that dominate within this mediatic flow can be, however, partly different from the actual content of the relevant legal instruments, at least according to their text as constructed according to ordinary rules of interpretation. Discrepancies are often linked to weaknesses in institutional communication by the government, and are multiplied by the confusion generated by a variety of acts of local authorities (at the regional and municipal level) that try to introduce even harsher restrictions, sometimes disregarding the statutory allocation of rule-making power between different levels of government.

This normative and communicative chaos led to a situation where citizens have objective difficulties in understanding the actual scope of their residual freedom of movement², but at the same time also one where the different police forces involved in the lockdown enforcement enjoy in practice a broad discretion whether to authorize or not individuals to move outside their homes. A discretion that was often used to serve priorities selected by the media, that frequently broadcasted “visual evidence” of situations that at first sight appeared to violate the lockdown.

The enforcement patterns and the underlying legislative style that dominate the Covid-19 emergency in Italy are, however, not completely new in the recent development of its legal system, since they are fully in line with the policies pursued, for different purposes of social control, by the self-labeled “populist” governments that rule Italy following the last political elections, although there are significant precedents at local level also under left-wing administrations³. Within these policies the formal validity of the legal provisions, and the capacity

² This point has been raised by Michele Papa, “Decreti e norme vaghe tradotti sui media: la comunicazione che inquina il diritto”, *Il Dubbio*, April 21, 2020.

³ See for the municipality of Florence Alessandro Simoni and Giacomo Pailli, “Begging for Due Process: Defending the Rights of Urban Outcasts in an Italian Town”, *Seattle University Law Review* 39, 2016: 1303–1326.

of the sanctions to withstand court review, were not frequently the object of a special scrutiny by the policymakers, who were more interested in obtaining deterrence through the *perception* by individuals of a risk – real or not – of being sanctioned.

While these legal strategies were previously used only against marginal groups, for instance beggars that local administrations wanted to eject from city centers, under the Covid-19 emergency they appear to be the default solution, apparently yet without reaction by the public, that feels them as an unavoidable tool to pursue the protection of public health.

The hardline policy chosen by the Conte government, that curtails economic activity but as well strongly limits basic individual freedoms, is not only perceived (outside a restricted circle of liberal legal scholars and journalists) by most of the Italian population as a wise choice, at least for the time being. It has even become a matter of national pride, with all the major newspapers unanimously labeling as “irresponsible” those foreign governments that did not follow the Italian lockdown model, considered as the only effective solution. Yet, even in this respect, nothing should be easily taken at face value. Even a cursory analysis of the coverage by Italian media of the legal solutions introduced elsewhere is sufficient to highlight that – while legal nationalism can be of some comfort in an extreme situation – before proudly affirming that a level of restrictions of rights and freedoms as that imposed on Italian society was crucial in fighting the pandemic, it is wise to humbly look around more carefully.

2 From Law “in the Books” to “Law in the Press”: The “Physical Activity” Issue Under the Covid-19 Lockdown Rules

The legal tools introduced in the context of the Covid-19 pandemic stretched to their outer limits the rule-making powers that can be used by the executive branch according to the Italian constitution. The 1948 Constitution indeed does not envisage a “state of emergency”, but only provisions applicable in time of war. The government therefore issued in a first phase a line of decrees based on the declaration of a statutory state of emergency that was issued at the end of January⁴. In different steps undertaken in swift succession, the government

⁴ *Delibera del consiglio dei ministri 31 gennaio 2020, Dichiarazione dello stato di emergenza in conseguenza del rischio sanitario connesso all'insorgenza di patologie derivanti da agenti virali trasmissibili.*

eventually introduced inter alia the prohibition of movement between different municipalities, of any travel abroad, and the interruption of all “productive, industrial and commercial” activities (when these cannot be performed remotely) except those specifically foreseen in a list of essential ones. Most important, individuals can leave their homes *only* for certain purposes enumerated by the government. A milder regime, presented as the start of “Phase 2”, will be in force since May 4, but the government already clarified that this still will *not* include the possibility to leave home for a purpose different from those listed in the new decree, with the impossibility e.g., to visit friends, or simply stroll around⁵.

Let’s focus on the section of this legal regime that is most intrusive for individual freedoms. The government issued on March 25 a “decree-law”⁶, to provide a more suitable legislative basis to the measures adopted. The decree-law states inter alia that the government is empowered to introduce “limitations to the circulation of persons, even establishing limitations to the possibility to move from one’s residence, domicile or abode out of individual movements limited in time and space or motivated by work-related needs, situations of necessity or urgency, health or other specific reasons”⁷.

This legislative basis served as foundation for a more detailed rule eventually introduced in a further government decree (not in the form of decree-law), related to previous ones, according to which individuals are allowed to move from their homes only for “proven work-related reasons or situations of necessity”, while “it is forbidden to move in a municipality different from the one where they are currently located, with private or public means of transport, except for proven work-related reasons, absolute urgency, or health reasons”. A further sub-section establishes that any “outdoor game or recreational activity is forbidden”, while “it is permitted to individually practice

5 *Decreto del presidente del consiglio dei ministri 26 aprile 2020*. The content of the Covid-19 decrees is usually clarified by the FAQ available on the website of the Presidency of the Council of Ministers, that on May 3, 2020 (referring to the new decree), included the following section: “*Si può uscire dal proprio domicilio solo per andare al lavoro, per motivi di salute, per necessità (il decreto include in tale ipotesi quella di visita ai congiunti, vedi FAQ), o per svolgere attività sportiva o motoria all’aperto. Pertanto, le passeggiate sono ammesse solo se strettamente necessarie a realizzare uno spostamento giustificato da uno dei motivi appena indicati*”.

6 My translation. In the Italian system “decree-laws” (*decreti legge*) are legislative acts that according to the constitution can be enacted by the government in “extraordinary cases of necessity and urgency” and that, in order to remain valid, must be converted into statute by parliament within 60 days (see art. 77 Constitution).

7 *Decreto-legge 25 marzo 2020, n. 19, Misure urgenti per fronteggiare l’emergenza epidemiologica da COVID-19, art. 2 a*).

physical activity in the proximity of one’s home, with the respect, however, of the distance of 1 m from any other person”⁸.

The decree-law of March 25 specifies also that municipalities cannot adopt temporary decrees “in conflict with national measures”, that would be otherwise void⁹. The same applies to acts adopted by the regions, with some differences.

These norms, established through a long chain of decrees, do not have a significant political history behind them, but certainly a major mediatic one. The sub-section addressed to municipalities represents indeed a reaction against the flood of ordinances issued by a number of mayors across Italy, who wanted to locally apply an even stricter “stay at home” policy. Usually these local ordinances were widely advertised in national newspapers, even if their application concerned relatively small towns. While their legal validity, even before the decree-law of March 25, could have been objected, such acts were part of broader visibility campaigns that sometimes brought to the attention of international public local politicians of minor Italian towns¹⁰.

It would be naive to think that the “fault line” between municipalities and the State concerned mighty health risk management issues, like those that all over Europe were discussed on a daily basis. This was not the case: in fact, the most frequent “legal pluralism clashes” concerned “runners” (the English word is used) or – in a terminology also frequent in this kind of administrative acts – those who practice “jogging”. A huge number of mayors, and at least one governor of a region

8 *Decreto del presidente del consiglio dei ministri 10 aprile 2020, Ulteriori disposizioni attuative del decreto-legge 25 marzo 2020, n. 19, recante misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale*, artt. 1 a) and 1 f). My translation, in the original version 1 a) sounds “sono consentiti solo gli spostamenti motivati da comprovate esigenze lavorative o situazioni di necessità ovvero per motivi di salute e, in ogni caso, è fatto divieto a tutte le persone fisiche di trasferirsi o spostarsi, con mezzi di trasporto pubblici o privati, in un comune diverso rispetto a quello in cui attualmente si trovano, salvo che per comprovate esigenze lavorative, di assoluta urgenza ovvero per motivi di salute e resta anche vietato ogni spostamento verso abitazioni diverse da quella principale comprese le seconde case utilizzate per vacanza”, while 1 f) sounds “non è consentito svolgere attività ludica o ricreativa all'aperto; è consentito svolgere individualmente attività motoria in prossimità della propria abitazione, purché comunque nel rispetto della distanza di almeno un metro da ogni altra persona”.

9 See *Decreto-legge 25 marzo 2020, n. 19, Misure urgenti per fronteggiare l'emergenza epidemiologica da COVID-19*, art. 3.1 (regions), 3.2 (municipalities). In the original version art. 3.2 sounds “I Sindaci non possono adottare, a pena di inefficacia, ordinanze contingibili e urgenti dirette a fronteggiare l'emergenza in contrasto con le misure statali, né eccedendo i limiti di oggetto cui al comma 1”.

10 See for instance Angela Giuffrida, “This is not a film’: Italian mayors rage at virus lockdown dodgers”, *The Guardian*, March 23, 2020.

(*Campania*)¹¹, indeed issued ordinances or “clarifications” stating that even individual sport activities (usually identified primarily with running) were completely forbidden.

Any Google search would produce an impressive number of entries, providing ample evidence that banning runners was perceived as a priority by a substantial share of mayors. Once again, such local acts, particularly after the March 25 decree-law, were definitely illegal, and could have been conceived at most as transitional emergency measures in case of a sudden increase in local risk levels, which is never mentioned. In at least one very recent case concerning the town of Pescara, the local *Prefetto* invited the mayor to withdraw one such ordinance that was considered as a clear violation of the duty of loyal cooperation¹², as well as a possible source of confusion among law enforcers, due to its lack of adequate legal ground.

As mentioned in the note of the *Prefetto* of Pescara, if taken seriously and actually enforced the ordinance of the mayor could have implied legal consequences of some magnitude, including a liability of the administration for the costs incurred. These legal consequences were likely to be mostly theoretical, since the overall impression that one gets from the news is that actual enforcement against “runners” was not a priority of the mayors. The practical function of the ordinances was to serve as a “fake legal basis” for the local police to convince runners to minimize their presence in public spaces, while obtaining the headlines on the local and national media. In other words, the hunt was far more important than the prey.

This approach was per se rational, if one thinks about the mayors in terms of what they are, i.e., political actors. Mayors did not have serious indicators that runners implied any specific risk of contagion. They were, anyhow, under a massive and constant pressure coming from the media, that “targeted” runners with arguments maybe not so sound but very powerful in terms of inducing “moral panic”. Among the hundreds that can be found on the web, one is especially interesting, since it comes from a quasi-official site, that of the Campania section of the Italian Association of Municipalities (*Associazione Nazionale Comuni d'Italia- ANCI*), which writes: “These behaviors [the fact of running] are legal but profoundly wrong. [...] . It is otherwise difficult to imagine that in the towns martyred by wars, like Sarajevo or Aleppo, people run around under the bombs. With an invisible enemy, like this virus, one must

¹¹ *Giunta Regionale della Campania, chiarimento n.6 del 14 marzo 2020.*

¹² Ansa, April 15, 2020, “Coronavirus: prefetto Pescara, ordinanza sindaco inefficace”; Paolo Vercesi, “Coronavirus, Pescara finisce sulla stampa cinese”, *il Messaggero (edizione Abruzzo)*, April 21, 2020.

apply even more caution”¹³. The official text of the “clarification” openly stresses that this was issued by the administration after “TV programs” revealed the presence of persons making some sort of physical activity in public spaces. The mayors reacted thus to a clear input by the media that raised the alarm against alleged violations of the lockdown, while they were clearly aware that in most of Italy “runners” are, however, a minority of the voting population.

The huge number of ordinances and news reports conceals the simplicity of the situation from the perspective of a traditional lawyer. Since the early versions of the national lockdown ordinances, their text constantly allowed to get out of home for “physical activity” (*attività motoria*), and a clarification of the Minister of Interior specified that the concept of physical activity does not encompass only “sporting activity” (the example mentioned is again that of “jogging”)¹⁴, but also simply walking, something that appears as reasonable considering the benefit of physical exercise also for persons who are less fit, or simply do not like to run. But the official text was captured in a mediatic game that made it rapidly irrelevant, absorbed by the rhetoric of the “Stay at home” campaign. As mentioned in statements by government members, the inclusion in the decrees of the possibility of “physical activity” was due to scientific advice, that deemed it necessary in order to minimize the negative health consequences of a longer lockdown, clearly balancing costs and benefits. The government, under the pressure of an enflamed debate, eventually accepted to mediate, introducing the limit of the obligation to exercise in the “proximity” of home, which generated a range of interpretations varying between 150 and 1000 m¹⁵.

In an ordinary situation, a solution like the one just mentioned would imply the introduction of a wide discretion in the hands of law enforcers to establish what “proximity to home” means, but with no ban to the possibility to perform at least some sort of moderate outdoor activity, thus going out of home not only for purchasing food, tobacco (exempted by the lockdown), or pharmaceutical items. But under a media coverage constantly and obsessively reporting the local prohibitions to physical activity, the widely shared public perception, the “popular legal culture”, was that running and the like was a “legally grey area” in the whole country, rather than an activity clearly authorized *expressis verbis*, and well rooted in the fundamental freedoms temporarily suspended by the lockdown. Many persons therefore abstained from any kind of outdoor exercise.

¹³ ANCI Campania, March 14, 2020, “Chiarimento della Regione mette fine al paradosso: non si può fare jogging” (my translation).

¹⁴ Circolare Ministero dell’Interno, March 31, 2020, N. 15350/117(2) Uff.III-Prot.Civ.

¹⁵ Alberto Sangia, “La difficile sorte dell’attività motoria nell’ordinanza del ministro della salute al tempo del coronavirus”, *Il Sole -24 Ore*, March 27, 2020.

The Covid-19 pandemic thus gave us the opportunity of a mass experiment of legal sociology, after which we learned that what matters is not only the difference between “law in the books” and “law in action”, but how the “law in the books” becomes first “law in the press”, before – later on – moving to “action”.

3 The “Last Meter of the Rule of Law”: Populist Legal Strategies Before and After Covid-19

The paradoxical battles around the possibility to prohibit physical exercise outdoor, notwithstanding the standard legal sources clearly authorized it, was in our opinion a symbolic battle that some mayors exploited as an opportunity to get political gains with an easy fight, not involving complex decisions like e.g., those concerning economic activities. Moreover, since the harassment of runners had a weak legal basis it rarely took the form of the application of actual fines. The stakes in terms of social control were, after all, limited and concerned a relatively small number of persons. The life-changing novelty for average Italians was instead the obligation, to simply get out of home, of providing a justification based on vague concepts as “necessity” and the like, particularly if crossing a border between two municipalities, and even more a regional border.

In order to ensure the effectiveness of such restrictions, the first versions of the decrees established the application of a criminal sanction, stating that the violation of the basic lockdown rules violated article 650 of the criminal code, punishing the breach of orders of a public authority. After a while, it became clear that this would have implied a load of several tens of thousands of files in the prosecution offices all over Italy, with a likely collapse of the system and the impossibility to process all of them. In the last decrees, the criminal sanction was thus left only for particularly serious violations, like the breach of the quarantine by those who are found Covid-19 positive, while ordinary lockdown violations lead only to an administrative fine. It is interesting to note, however, that this reduction of the scope of application of criminal sanctions met (notwithstanding the practical problems just mentioned) the opposition of some heads of prosecution offices, one of whom even proposed the introduction of a new *ad hoc* crime, that would have allowed law enforcement officers *to arrest on the spot anyone* found in violation of all *ordinary* lockdown rules¹⁶.

¹⁶ The proposal was of Luigi Patronaggio, public prosecutor in Agrigento, *la Repubblica*, March 27, 2020.

The idea that criminal law (or at least severe administrative sanctions supported by “muscular” police control) is the only solution when behavior modifications are required dominates within Italian society since several years. This idea finds supporters across the whole political spectrum, but the most vocal ones are certainly within the populist parties, like Lega Nord and Five Stars movement. It is therefore unsurprising that the first lockdown instruments relied on the use of criminal law.

On a closer look, it is – however – important to note that this populist trend does not have a preference for criminal law as sole feature, but it also has a further pillar, namely the frequent use of rules that give to law enforcers a wide discretion whether to start or not the process (prosecution, but also administrative procedures) leading to punishment. A punishment that, even when of an administrative nature, can sometimes lead to serious consequences due to the amount of the fine or to indirect legal effects.

This strategy was developed in multiple occasions before the Covid-19 emergency, in the context of situations where there was an interest in “cleaning” towns from beggars and other persons living as marginal. Examples are the reintroduction of the crime of “intrusive begging” and the introduction of harsher prison sentences for persons occupying parts of land or buildings, as well as the introduction within local police regulations of administrative provisions sanctioning “nuisance” in the streets¹⁷.

All the tools just mentioned have in common indeed one point: in most cases an individual law enforcement officer will not suffer any consequence if he or she will not take action, by notifying the prosecutor or issuing the fine. This will be simply his/her choice. He/she will be – one can say – the master of the “last meter of the rule of law”, of those “face to face” situations where his/her decision will make the difference between on the one hand starting a criminal case or the application of a heavy administrative fine, and on the other hand simply nothing. A decision that is especially important in the Italian system, since the Constitution contains (art. 112) a principle of compulsory prosecution, according to which the prosecutor cannot withdraw prosecution on grounds of expediency. In the second of the two “security decrees” enacted by the former populist government (also with Giuseppe Conte as Prime Minister), it was also decided to abolish, for a number of typical “street crimes” like insulting,

¹⁷ For a review of legal developments in this respect see Giacomo Pailli, “Applicazione selettiva del diritto e strategie di tenuta a distanza dello straniero”, forthcoming in *Diritto, Immigrazione e Cittadinanza*, 2020. See as well Simoni, and Pailli, “Begging for Due Process”.

assaulting and threatening public officers, the previously existing possibility to acquit when the fact is of minor relevance¹⁸.

This strategy, together with the intrinsic vagueness of some categories (“nuisance”, “necessity”, etc.) frequently transforms the meeting between law enforcement officers and citizens in a negotiation, where the power of the officer is counterbalanced by the capacity of the citizen to appear as a “mainstream” person, possibly one with a significant cultural, social and relational capital.

At the same time, this flexibility in choosing whether to “set the machine into motion or not”, leads to a system where enforcement can be easily steered by political actors, selectively putting police pressure on specific social groups. At the same time, particularly at the local level, enforcement can be targeted and directed in line with the wishes of the media. Very frequent are e.g., situations where a local online newspaper or television, by a continuous display of pictures of a certain group of beggars or other urban marginal in a city center, conveys the idea of an ongoing “invasion”, thus forcing administrators to intervene.

The Covid-19 emergency extended the possibility to use such strategies beyond the wildest dreams of any populist policy maker. It will be interesting to see whether the end of the emergency will move back the equilibrium of the law enforcement process a little more distant from the “last meter of the rule of law”.

4 Blaming the “Others”: The “Comparative Law” of Populism

Choices like the lockdown decided by the Italian government are unavoidably accompanied by mediatic efforts to create a cohesion among citizens and a trust of policy makers. These goals can be pursued through different discourses, and a typical one is the presentation of what is done in the country as the “best possible solution”, stressing the absence of alternative models. In the Italian case the discourse that prevailed in the media has a strong nationalistic flavor, with very little serious information about other countries and a tendency to blame those who allegedly did not follow the “Italian approach”.

¹⁸ “Non punibilità per particolare tenuità del fatto”, foreseen by art. 131 bis *Codice Penale*, modified by art. 16 of *Decreto-legge 14 giugno 2019, n. 53, “Disposizioni urgenti in materia di ordine e sicurezza pubblica”*, as transposed into ordinary legislation by law of August 8, 2020, n.77. The President of the Republic, in a letter addressed to the Parliament and the government before signing the law, mentioned the consequences in terms of exceedingly harsh sanction of very minor violations of this provision, that is now under review by the Constitutional Court in a case referred by the court of Turin. See *Tribunale di Torino, Sez. I, Ordinanza, 5 febbraio 2020*.

A preferential target of Italian newspapers during the first weeks of enforcement of the lockdown has been Sweden, which applies a radically different policy to contain the pandemic. The Swedish policy is indeed in a legal perspective based primarily on recommendations, with no limitations to freedom of movement and a formal ban only for public gatherings of more than 50 persons (500 in the first phase)¹⁹. A law was eventually approved in order to provide the government with rule making powers to introduce binding restrictions without a previous vote by the parliament, but these powers have not yet been used, nor their use is likely at least in the short term²⁰.

The two Italian leading newspapers, *la Repubblica* and *Corriere della Sera* published a series of articles where the Swedish strategy was constantly presented as a disputable exercise disregarding the value of human lives. These articles inter alia objectively distorted the meaning of a speech of the Swedish Prime Minister Stefan Löfven²¹, giving the false impression of a forthcoming change of strategy imposed by facts. The bias in the reporting of the Swedish Covid-19 strategy was such that the Swedish ambassador in Rome reacted with an open letter²². Attacks against the Swedish policy came, by the way, also from Donald Trump, that several times blamed Sweden in its tweets, most recently writing that “Despite reports to the contrary, Sweden is paying heavily for its decision not to lockdown [...] The United States made the correct decision!”²³

An interesting aspect of the criticisms coming from both Donald Trump and the Italian mainstream newspapers is the frequent reference to a possible link between the liberal policy adopted by Sweden and its higher death rate compared to its neighboring countries, particularly Denmark and Norway, where mortality due to Covid-19 is still very low. In Italy, this was used to – once again – convey the message that a lockdown “Italian style” is an indispensable tool to control the pandemic.

19 Förordning (2020:114) om förbud mot att hålla allmänna sammankomster och offentliga tillställningar.

20 Lag om ändring i smittskyddslagen (2004:168) of April 17, 2020.

21 See e.g., Andrea Tarquini, “Coronavirus, aumentano i contagi in Svezia. Il mea culpa del premier: ‘Non abbiamo fatto abbastanza’”, *la Repubblica*, April 11, 2020; Sandro Orlando, “Coronavirus, la Svezia pronta a cambiare rotta: Basta ‘tutto aperto’, prepariamoci a migliaia di morti”, *Corriere della Sera*, April 5, 2020.

22 “La Svezia contro i giornali italiani”, *il Post*, April 16, 2020. At least *la Repubblica* seems to have in the last week completely changed its line. See Thomas Erdbrink and Christina Anderson, “La vita deve andare avanti”. Ecco come la Svezia ha affrontato il virus senza chiudere tutto”, *la Repubblica*, May 2, 2020.

23 The most recent tweet and a commentary can be found in Morton Buttler and Nick Rigillo, “Trump’s Latest Attack on Sweden Revives Covid-19 Controversy”, *Bloomberg*, May 1, 2020.

This discourse neglects, however, one relevant point, i.e., that the restrictions introduced in Denmark and Norway have little in common with those introduced in Italy, and that the difference is indeed most striking if one takes the perspective of the Italian “Stay at home” manifesto. Denmark e.g., simply forbids outdoor public gatherings of more than 10 persons, with no restrictions to individual freedom of movement²⁴. Certainly, the Swedish policy has a complex background, that cannot be summarized here²⁵, and a more careful analysis of the possible explanations of the differences vis-à-vis the choices of the other Nordic countries could provide interesting data. But for sure the nationalistic media coverage of Sweden made for Italian readers in the middle of the lockdown did not provide any convincing argument that the strict limitations on individual freedom they were experiencing were unavoidable in the fight against Covid-19.

5 Conclusions

The Covid-19 emergency is submitting the Italian legal system to a “stress test”, but not in the sense of an immediate risk of democratic backsliding, since there are not yet signs of anyone willing to exploit the crisis to substantially set aside constitutional guarantees. The stress to the legal system derives instead from the steep increase in a trend, already noticeable under the previous populist government, towards the expansion of a law enforcement sector with broad hidden discretionary powers and accustomed to establishing its priorities under the pressure of the media and of political actors.

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²⁴ *Bekendtgørelse om forbud mod større forsamlinger og mod adgang til og restriktioner for lokaler og lokaliteter i forbindelse med håndtering af covid-19, nr 445 af 19/04/2020*.

²⁵ See, for a valuable overview in English, Martin Schibbye, “The Swedish Corona Experiment – or Everyone else’s?”, *The Investigative Journal*, April 10, 2020.

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